Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit's *Marks v. Crunch San Diego, LLC* Decision	)	CG Docket No. 18-152
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278

COMMENTS OF ADT LLC d/b/a ADT SECURITY SERVICES

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October 17, 2018

Executive Summary

Marks adopted an overly expansive interpretation of the definition of an automatic telephone dialing systems ("ATDS") that ignores the statutory language of the Telephone Consumer Protection Act ("TCPA"), and both misreads and misapplies the TCPA's legislative history and context. *Marks* also suggests an overly cramped interpretation of what constitutes sufficient human intervention to disqualify equipment as an ATDS. There is nothing in the Ninth Circuit's opinion that should dissuade the Federal Communications Commission ("Commission") from confirming that equipment qualifies as an automatic telephone dialing system only if it has the present capacity to generate random or sequential telephone numbers. The record in this proceeding overwhelmingly supports that interpretation.

ADT LLC d/b/a ADT Security Services ("ADT") is the nation's largest alarm monitoring and smart home service provider, serving more than seven million customers. In the normal course of its business, it sends millions of non-telemarketing, informational calls to its customers imparting vital information on matters such as the status of alarm equipment and upcoming appointments. With the sheer size of its customer base, ADT simply could not engage in this volume of customer outreach without the use of efficient calling technologies, which ADT described in its earlier comments. Given the volume of calls, ADT has invested substantial resources to develop a state-of-the art TCPA compliance program. ADT nevertheless finds itself the target of TCPA litigation based most recently on its efforts to reach consumers who are behind on their payments – a type of call that TCPA's legislative history makes clear was never intended to be regulated.

Contrary to the Ninth Circuit's superficial assessment of the structure and history of TCPA, an examination of Congress's intent in enacting this important consumer protection

reveals that it was overwhelmingly concerned with unconstrained, automated, prerecorded cold call telemarketing messaging, not with legitimate business communications aided by efficient calling technologies that targeted those with whom the company had an established business relationship, or from whom the company had obtained consent. The specific evil addressed by Congress's restrictions around the use of automatic telephone dialing systems was the danger to public health and disruption of commerce resulting from haphazardly delivering prerecorded messages to specific categories of telephone numbers through dialing randomly or sequentially generated numbers.

To reach its erroneous definition of an ATDS, the Ninth Circuit not only misreads the structure or history of the TCPA, but also ignores the Commission's original guidance on the definition of an ATDS, which found that an ATDS must have the functionality to randomly or sequentially generate numbers. The Commission most forcefully rendered this guidance in the context of debt collection calls using dialing technologies calling preprogrammed lists of numbers. The Commission had no difficulty concluding that such calls were not subject to regulation because they were not randomly or sequentially generated.

The *Marks* court also disregards well-established canons of statutory construction—including precedent from its own circuit—that compel an interpretation that equipment must have this functionality to qualify as ATDS. The Ninth Circuit's erroneous decision creates a circuit split and a troubling precedent for trial courts in that circuit. Numerous other courts, applying reasoned analysis and sound textual analysis, have readily reached a contrary conclusion.

The Ninth Circuit's reasoning that the TCPA's prior consent and federal debt collection exceptions support the conclusion that ATDS includes devices that solely call from lists is

unpersuasive. The TCPA's legislative history demonstrates that Congress's primary concern was not with the use of autodialing technology generally, but specifically with telephony devices that dial randomly or sequentially generated numbers in order to deliver prerecorded messages. These arbitrarily dialed calls tied up emergency and business lines, creating public safety hazards, imposing additional costs on consumers, and interfering with commerce. Nothing in the legislative history or context of the prior consent or federal debt collection exceptions warrants the Ninth Circuit's conclusion that Congress meant to include in the ATDS definition devices that call from lists.

The result of the Ninth Circuit's erroneous analysis is a definition of ATDS that provides little meaningful guidance to callers and is untethered from the TCPA's text and purpose. Compounding this interpretational affront is the fact that the *Marks* decision possibly sweeps in every smartphone—potentially subjecting nearly all American consumers to TCPA liability for their routine calls and texts in direct contravention of the D.C. Circuit's decision in *ACA International*. Make no mistake, the expansive ATDS interpretation adopted by *Marks* will only serve to increase abusive and unfounded TCPA litigation.

The Commission should reject the Ninth Circuit's flawed interpretation and confirm that a device qualifies as an ATDS only if it presently possesses the functions expressly stated in the TCPA's statutory definition of ATDS. Specifically, the telephony device must actually be able (i) to store or produce numbers to be called, using a random or sequential number generator, and (ii) to dial those numbers. In other words, equipment that only dials numbers from lists does not qualify as an ATDS.

Additionally, the Commission should confirm that human intervention in the calling process disqualifies a device from being an ATDS, and that common technologies such as

"clicker agents" constitute sufficient human intervention. To avoid any lingering disputes regarding potential capacity, the Commission should also conclude that the TCPA only applies to calls or texts that are made using a device's autodialing functionality. Properly defining an ATDS—according the TCPA's text and Congressional intent—will substantially reduce uncertainty and help mitigate the onslaught of TCPA litigation.

Lastly, the Commission should also take this opportunity to update antiquated distinctions between wireless and landline informational calls and texts between businesses and their customers. Congress's primary concern was with telemarketing calls, not legitimate business communications. Given that wireless is now the predominate method of communication, and that almost all wireless calls and texts are now "without charge," the Commission should use its delegated authority to exempt free to end user wireless informational calls. Additionally, the Commission should apply an established business relationship exemption for wireless informational calls. Both mechanisms would restore the balance that Congress originally intended between consumer privacy and preserving and protecting legitimate business communications. This approach provides straightforward protections for informational calls without having to litigate the ATDS question.

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COMMENTS OF ADT LLC d/b/a ADT SECURITY SERVICES

ADT LLC d/b/a ADT Security Services ("ADT") submits these comments in response to the Consumer and Governmental Affairs Bureau's October 3, 2018, *Public Notice* seeking further comment regarding the definition of an automatic telephone dialing system ("ATDS") following the decision in *Marks v. Crunch San Diego, LLC*.[1]

Marks adopted an overly expansive interpretation of the definition of an ATDS that ignores the statutory language of the Telephone Consumer Protection Act ("TCPA"), and both misreads and misapplies the TCPA's legislative history and context. *Marks* also disregarded the level of human involvement necessary to send the texts at issue in that case. The Federal Communications Commission ("Commission") should take this opportunity to reject the court's analysis in *Marks* and confirm, as overwhelmingly supported in the record, that an ATDS must

[1] *Consumer and Governmental Affairs Bureau Seeks Further Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit's Marks v. Crunch San Diego, LLC Decision*, Public Notice, DA-1014 (rel. Oct. 3, 2018) [*Public Notice*]. *See Marks v. Crunch San Diego, LLC*, No. 14-56834, 2018 WL 4495552 (9th Cir. Sept. 20, 2018) [*Marks*]. The appellee, Crunch, has filed a petition for *en banc* review. *Appellee's Petition for Rehearing En Banc*, Case No. 14-56834, (9th Cir. Oct. 4, 2018).

have the present capacity (and use that capacity) to randomly or sequentially store and produce numbers to be dialed without human intervention. Equipment that dials numbers from lists does not qualify as an ATDS. Equipment that requires human intervention also does not qualify as an ATDS. The Commission should also use this opportunity to update the TCPA by exempting non-telemarketing, informational calls to cell phones, just as such calls are exempt when made to residential lines.

Background

As the nation's largest alarm monitoring and smart home service provider serving more than seven million customers, ADT engages in a large variety of communications with its customers. For example, ADT initiates informational calls to customers to schedule or confirm service appointments, to inform them of the existence of conditions with their alarm system that may require service, such as a low battery, or to notify them of an alarm event. ADT also makes calls to collect past due amounts for services rendered, although the volume of such calls is significantly lower than the volume of calls made to its customers regarding operational issues. In its normal course of business, ADT makes millions of such non-telemarketing calls per month to its customers. ADT also uses calling technology for telemarketing, but only after obtaining the appropriate level of prior written consent and closely vetting and supervising third-party vendors to ensure compliance. ADT makes far fewer telemarketing calls than informational calls.

With the sheer size of its customer base, ADT simply could not engage in this volume of customer outreach without the use of efficient calling technologies, which ADT described in its

earlier comments.[2] The calling platforms used by ADT lack the capacity to store or produce numbers using a random or sequential number generator, and they require the degree of human intervention that courts repeatedly have found sufficient to remove the equipment from the definition of an ATDS.[3] The technology efficiently connects ADT's customers with live agents or delivers brief prerecorded messages regarding operational issues.

Given the volume of calls, ADT has invested substantial resources to develop a state-of-the-art TCPA compliance program, which is described in detail in its previous comments.[4] The efficacy of ADT's compliance efforts is reflected in the complete absence of any consumer claims regarding the delivery of informational/operational messages, and only two TCPA claims - pursued by *pro se* plaintiffs - regarding telemarketing activities over the past two years.

ADT nevertheless finds itself the target of TCPA litigation based on its efforts to reach consumers who are behind on their payments. The irony of these claims is that Congress never intended the TCPA to regulate automated debt collection calls. *See* H. Rep. 102-317, at 17 (1991) ("[A] retailer, insurer, banker or other creditor would not be prohibited from using an automatic dialer recorded message player [ADRMP] to advise a customer (at the telephone number provided by the customer) that an ordered product had arrived, a service was scheduled or performed, *or a bill had not been paid"*) (emphasis added); *id.* at 16 (the bill's prohibition against making calls using an ATDS is "in no way intended to include calls to collect debts"); 137 Cong. Rec. H11310 (daily ed. Nov. 26, 1991) (anticipating that the Commission will exempt calls that "leave messages with consumers to call a debt collection agency to discuss their student loan" because such messages do not "adversely affect the privacy rights" the TCPA was

[2] *See Comments of ADT LLC d/b/a ADT Security Services*, CG Docket Nos. 18-152, 02-278, at 4-5 (filed June 13, 2018 [*ADT Comments*].
[3] *ADT Comments* at 4 & 13, n.21 (citing cases).
[4] *See ADT Comments* at 2-8 (describing ADT's compliance program).

intended to protect) (statement of Congressman Markey); *id.* at H11312 ("Calls informing a customer that a bill is overdue . . . should not be prohibited") (statement of Congressman Lent); 137 Cong. Rec. S16204 (delegating rulemaking authority to the Commission to create exemptions in response to "companies that use machines to place calls for debt collection") (statement of Senator Hollings).

Following Congress's direction, the Commission exempted all forms of commercial, non-telemarketing calls, including debt collection calls, to residential lines.[5] At the time, the exemption of debt collection and other non-telemarketing calls to residential lines was highly significant given that Congress's concern regarding privacy focused on repetitive and ill-timed calls to consumers' homes.[6]

The Commission's re-evaluation of the scope of the TCPA on the heels of *ACA Int'l* and now *Marks* provides an opportunity to restore the balance that Congress intended to achieve in enacting this important consumer legislation twenty-seven years ago. As previewed above and further detailed below, Congress's primary concern lay with unconstrained, automated, prerecorded cold call telemarketing messaging, not with legitimate business communications aided by efficient calling technologies that targeted those with whom the company had an existing or prior business relationship, or from whom the company had obtained consent. The specific evil addressed by Congress's restrictions around the use of automatic telephone dialing

[5] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd. 8752, 8772, ¶39 (1992) [*1992 Order*].

[6] *See* 137 Cong. Rec. H. 11307 ("[A] person's home is his castle. Preservation of the tranquility and privacy of that castle should compel us to avail consumers of the opportunity to place the telephone line into their home, the sanctuary from which they escape all the other trials that society and Congress cause them, off limits to intrusive and annoying interruptions. I believe that telemarketing can be a powerful and effective business tool, but the nightly ritual of phone calls to homes from strangers and robots has many Americans fed up.") (Statement of Congressman Markey).

systems was the danger to public health and disruption of commerce resulting from haphazardly reaching telephone numbers randomly or sequentially generated.

I. The Commission Should Exercise its Delegated Authority to Reject the Analysis in *Marks* and Confirm that ATDS Must Have the Present Capacity to Store and Produce Numbers Generated Randomly or Sequentially.

Following the D.C. Circuit's opinion in *ACA Int'l*, courts throughout the country have been grappling with the appropriate definition of an ATDS. Courts have been split on whether the Commission's pre-2015 findings that predictive dialers qualified as ATDS remain valid after *ACA Int'l.*,[7] and on the functions that equipment must have the capacity to perform in order to qualify as ATDS.[8] The Third Circuit in *Dominguez v. Yahoo*, for example, concluded that an ATDS must have the "present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers."[9] The Ninth Circuit in *Marks* reached the contrary conclusion, creating a split in the Circuits and setting a troubling precedent for trial courts within that Circuit.

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[7] *See, e.g., Fleming v. Assoc. Credit Serv., Inc.*, No. 2:16-cv-03382, 2018 WL 4562460 (D. N.J. Sept. 21, 2018) (citing cases). Those courts that have concluded that the D.C. Circuit vacated the 2003 and 2008 predictive dialer rulings as well as the 2015 Order include: *Marks*, 2018 WL 4495552, at *6; *Gonzalez v. Ocwen Loan Serv'g., LLC*, No. 5:18-cv-340-Oc-30PRL, 2018 WL 4217065, at *5-6 (M.D. Fla. Sept. 5, 2018) (concluding that, as a matter of law, a predictive dialer is not an ATDS under the TCPA's statutory definition); *Washington v. Six Continents Hotels*, No. 2:16-CV-03719, 2018 U.S. Dist. LEXIS 145639, at *8-9 (C.D. Cal. Aug. 24, 2018); *Keyes v. Ocwen Loan Servicing, LLC.*, No. 17-cv-11492, 2018 WL 3914707, at *6 (E.D. Mich. Aug. 16, 2018); *Gary v. TrueBlue, Inc.*, No. 17-cv-10544, 2018 WL 3647046, at *6-7 (E.D. Mich. Aug. 1, 2018); *Pinkus v. Sirius XM Radio, Inc.*, 319 F. Supp. 3d 927, 932–40 (N. D. Ill. 2018) (granting summary judgment to defendant and concluding that predictive dialers, which dial from a set list of specific numbers are not TCPA autodialers as a matter of law); *Sessions v. Barclays Bank Del.*, 317 F. Supp. 3d 1208, 1212 (N.D. Ga. 2018); *Herrick v. GoDaddy.com*, 312 F. Supp. 3d 792, 799 (D. Ariz. 2018); *Marshall v. CBE Group, Inc.*, No. 2:16-cv-02406, 2018 WL 1567852, at *4 (D. Nev. Mar. 30, 2018).

Courts concluding that the 2003 and 2008 rulings were not vacated by *ACA International* include: *Pieterson v. Wells Fargo Bank, N.A.*, 2018 WL 3241069 (N.D. Cal. July 2, 2018) (effectively overruled by *Marks*); *O'Shea v. Am. Solar Solution, Inc.*, No. 14-894, 2018 WL 3217735, at *2 (S.D. Cal. July 2, 2018) (same); *Reyes v. BCA Fin. Services, Inc.*, No. 16-24077, 2018 WL 2220417, at *9-11 (S.D. Fla. May 14, 2018) (but noting that *ACA International* gave it "considerable pause" with respect to whether predictive dialers are automatic telephone dialing systems under the TCPA); *Maddox v. CBE Grp., Inc.*, 2018 WL 2327037 (N.D. Ga. May 22, 2018); *Swaney v. Regions Bank*, 2018 WL 2316452, at *1 (N.D. Ala. May 22, 2018).

[8] *Compare Marks*, 2018 WL 4495553 at *8 *with Herrick*, 312 F.Supp.3d at 799-800. *See also Fleming*, 2018 WL 4495553 at *9; *Pinkus*, 319 F. Supp. 3d at 938.

[9] *Dominguez v. Yahoo, Inc.* 894 F.3d 116, 121 (3d Cir. 2018).

Marks further highlights the need for the Commission to act quickly. The Ninth Circuit's decision, while currently binding in that Circuit, does not bind the Commission because the decision is predicated on the view that the statutory text is ambiguous. The Ninth Circuit's overly-broad construction of the ATDS definition would trump the Commission's contrary construction "only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[10] The Ninth Circuit found the statutory definition "ambiguous on its face."[11] *Marks* therefore does not bar a contrary interpretation by the Commission, which has been delegated authority to fill the gaps in ambiguous provisions of the Communications Act.[12] A key purpose of *Chevron* deference is that agencies must be able to use their delegated authority to revise "unwise judicial constructions of ambiguous statutes."[13] The Commission should quickly and decisively reject *Marks*, which, for all of the reasons described herein, was wrongly decided.

Marks not only conflicts with the Third Circuit's decision in *Dominguez* and other persuasive case law finding that ATDS must use a random or sequential number generator,[14] it appears, once again, to open the door to including smart phones within the ambit of an ATDS – an interpretation precluded by *ACA Int'l.*[15] Smart phones clearly have the capacity to store numbers. That is what contact lists do, for example. They may also have the capacity to automatically dial numbers, either presently or by downloading an application. Because *Marks* left open whether equipment must have the present or potential requisite capacity,[16] the decision

[10] *FCC v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).
[11] *Marks*, 2018 WL 4495553, at *8.
[12] *Brand X*, 545 U.S. at 980-81.
[13] *Id.* at 983.
[14] *Pinkus*, 319 F. Supp. 3d at 932–36; *Fleming*, 2018 WL 4562460, at *9–10.
[15] *ACA Int'l, et al. v. FCC*, 885 F.3d 687, 697–701 (D.C. Cir. 2018).
[16] *Marks*, 2018 WL 4495553, at *9, n.9.

revives the key concern raised in *ACA Int'l.*— that an overly broad interpretation would unlawfully expand TCPA liability.[17]

II. *Marks* Ignores the Commission's Pre-2003 Interpretation that ATDS Must Use a Random or Sequential Number Generator.

Marks correctly concludes that *ACA Int'l* vitiated the Commission's interpretations beginning in 2003 and culminating in the *2015 Order* that ATDS includes predictive dialers that call from lists of numbers. The court erroneously concludes, however, that there is thus no Commission guidance on the issue and it is left to interpret the statutory text rather than defer to the Commission's interpretations.[18] A more natural result of *ACA Int'l's* rejection of the Commission's 2003 to 2015 expansive views of the functions that an ATDS must perform would be to give effect to the Commission's initial interpretation of the TCPA that ATDS must have the functionality of generating numbers randomly or sequentially.

As Chairman Pai explained in his dissenting comments to the *2015 Order*:

> When the Commission first interpreted the statue in 1992, it concluded that the prohibitions on using automatic telephone dialing systems "clearly do not apply to functions like speed dialing, call forwarding, or public telephone delayed message services[], because the numbers called *are not generated in a random or sequential fashion*. Indeed, in that same order, the

[17] *ACA Int'l*, 885 F.3d at 706–709.

[18] The court asserts that the Commission's rule simply parrots the statutory text thus excusing the court from assessing the meaning of the Commission's rule as opposed to statutory language. *Marks*, 2018 WL 4495553, at *7, n.5. The court failed to note, however, that the Commission's regulation differs in one important way from the statute. The regulation does *not* include the comma before the random/sequential generator clause. *Id.* at *3, n.1. The removal of the comma makes even more clear that the natural reading of the sentence is that both store and produce are modified by the shared direct object ["telephone numbers to be called"] followed directly by "using a random or sequential number generator." For example, take the sentence "the farmer raised and distributed food using modern technology." One would naturally understand the sentence to mean that the farmer used modern technology to both raise and distribute food. This natural reading of the Commission's codified definition of ATDS to require random or sequential number generation is also wholly consistent with the Commission's orders stating that an ATDS must generate random or sequential numbers.

> Commission made clear that calls not "dialed using a random or sequential number generator" "are not autodialer calls."[19]

The point was made even clearer in the Commission's discussion of debt collection calls. As noted above, the Commission exempted autodialed debt collection calls by concluding that they were encompassed by the Commission's general exemptions for non-telemarketing calls and for calls with whom the caller had an established business relationship.[20] Creditors were nevertheless concerned with a Commission rule requiring that all "artificial or prerecorded telephone messages by an automatic telephone dialing system" identify the caller. Creditors were worried that this identification requirement would conflict with the Fair Debt Collection Practices Act, which barred such identifications.[21] The Commission alleviated those concerns by ruling that "the identification requirements will not apply to debt collection calls because such calls are not autodialer calls (*i.e.* dialed using a random or sequential number generator.)"[22] Debt collection calls are not made by arbitrarily dialing numbers. They are made to telephone numbers derived from lists. The Commission drove home the point in its 1995 Order on reconsideration:

> The TCPA requires that calls dialed to numbers generated randomly or in sequence (autodialed) . . . must identify the caller. . . . Household correctly points out that debt collection calls 'are not directed to randomly or sequentially generated telephone numbers,

[19] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, 8074 (July 10, 2015) (dissenting statement of Comm'r Pai) (quoting *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, 8776 para. 47 (1992)) (emphasis added by Pai). *See also id.* at 8089 (stating that "calling off a contact or from a database of customers . . . does not fit the definition [of an ATDS]") (dissenting statement of Comm'r O'Rielly).
[20] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752, 8773, para. 39 (1992).
[21] *Id.* at ¶38.
[22] *Id.* at ¶ 39.

> but instead are directed to the specifically programmed contact numbers for debtors.[23]

Rejecting *Marks* would restore the Commission's original interpretation of the statutory text that equipment must have the capacity to generate random or sequential numbers to qualify as ATDS.

III. *Marks* Ignores the Statute's Plain Text and Misreads the Legislative History and Context Regarding Automated Dialing Equipment.

Apart from ignoring the Commission's pre-2003 guidance, the *Marks* court's reasoning is seriously flawed. The *Marks* decision begins with a lengthy discussion of the TCPA's legislative history recounting Congress's concerns regarding the volume of unsolicited automated calls made to consumer's homes. This discussion sets the stage for the court's contextual analysis of two provisions of the TCPA—the exception for prior consent and Congress's 2015 TCPA amendment exempting federal debt collection calls—that lead it to infer that Congress intended the definition of ATDS to include equipment that calls from lists. The court, however, fails to undertake any textual analysis and misreads the legislative history and the context of the TCPA's restrictions on the use of ATDS equipment.

A. *The Court Failed to Address the Plain Language of the Statute.*

Rather than move directly to legislative history and context, the Ninth Circuit should have followed its own guidance and first utilized common rules of statutory construction to analyze the statute's text. Section 227(a)(1) of the TCPA defines an automatic dialing system as follows:

> (1) The term 'automatic telephone dialing system' means equipment which has the capacity –

[23] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Memorandum, Opinion and Order¸ 10 FCC Rcd 12391, 12400, ¶19 (1995). In this context, the Commission uses the term autodialer and ATDS interchangeably.

> (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and
> (B) to dial such numbers.[24]

The *Marks* court made no effort to parse this statutory text, concluding instead that the language is "ambiguous on its face."[25] Other courts, however, applying standard modes of statutory construction have concluded that the best reading of the statute's plain language is that ATDS must have the capacity to call randomly or sequentially *generated* numbers, not merely numbers from a list; courts have reached this conclusion without having to rewrite the text, as the *Marks* court has done.[26]

As ADT made clear in its reply comments in this proceeding, the punctuation canon of statutory construction compels reading the text to apply the clause "using a random or sequential generator" to "all previous phrases and not merely the immediately preceding phrase."[27] Under that canon of statutory construction, the random/sequential generator clause modifies both "store" and "produce." The court's failure to apply this mode of statutory construction is all the more surprising as the Ninth Circuit had just last year affirmed its use. *See Yang v. Magistic Blue Fisheries*, 876 F.3d 993, 1000 (9th Cir. 2017) ("[B]oth we and our sister circuits have recognized . . . [that] a qualifying phrase is supposed to apply to all antecedents instead of only the immediately preceding one where the phrase is separated from the antecedents by a comma."). This rule is an exception to the "last antecedent" rule, which construes a clause to

[24] 47 U.S.C. § 227(a)(1) (1991).
[25] *Marks*, 2018 WL 4495553, at *8.
[26] By rewriting the text, *Marks* commits the very sin it accuses the parties in the case of committing. The court rejected Marks's and defendant's competing interpretations because they "fail to make sense of the statutory language without reading additional words into the statute." *Id.* The plaintiff proposed to read the definition as stating that an "ATDS is 'equipment which has the capacity (A) to [i] store [telephone numbers to be called]' or [ii] produce telephone numbers to be called using a random or sequential number generator." *Id.* The court, however, reaches the same result as proposed by the plaintiff, concluding that the definition should read that an ATDS means "equipment which has the capacity – (1) to store [numbers to be called] or (2) to produce numbers to be called, using a random or sequential number generator." *Id.* at *8–10.
[27] ADT Reply Comments at 2 & n.7 (citing the Ninth Circuit's opinion in *Yang*, 876 F.3d at 1000).

modify only the immediately preceding term or phrase. In this instance, the last antecedent rule, if it were applicable, would indicate that the clause would only modify "produce."

Supporters of a broad ATDS definition, including the *Marks* plaintiff, use the last antecedent rule to claim that the random/sequential generator clause cannot modify "store." They assert that this is the only reasonable reading of the text because a random/sequential generator cannot be used to store numbers. The Ninth Circuit seemed troubled with that argument. It declined to give persuasive weight to the Third Circuit's opinion in *Dominguez* on the dubious ground that the Third Circuit failed to resolve the "linguistic problem" of "how a number can be *stored* (as opposed to *produced)* using a 'random or sequential number generator.'"[28] Courts, however, have resolved this "linguistic problem," to the extent it really exists in the first place.[29]

Pinkus notes that both "store" and "produce" are transitive verbs that require an object. In the case, the object is the phrase "telephone numbers to be called." As a result, "despite the disjunctive 'or' linking 'store' and 'produce,' 'store' is not a grammatical orphan, rather, like 'produce' it is tied to the object, 'telephone numbers to be called.'"[30] The court then naturally inquires, what kinds of telephone numbers?[31] It answers its own question by concluding that "[g]iven its placement immediately after 'telephone numbers to be called,' the phrase 'using a random or sequential number generator' is best read to modify 'telephone numbers to be called,' describing a quality of the numbers an ATDS must have the capacity to 'store' and 'produce.'"[32]

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[28] *Marks*, 2018 WL 4495553, at *9 n.8. (emphasis in original).
[29] *See Pinkus*, 319 F. Supp. 3d at 936–40. As ADT pointed out it in its reply comments, it is not unreasonable to assume that an ATDS would store randomly or sequentially generated numbers for some period of time before they are dialed: "The ATDS definition refers to a system and it is completely reasonable to read the definition as applying to equipment that as the capacity to store numbers that were produced by a random or sequential number generator before those numbers are dialed, even if that storage lasts for a matter of seconds or milliseconds, or stores randomly or sequentially generated numbers for calling at another time." ADT Reply Comments at 4.
[30] *Pinkus*, 319 F. Supp. 3d at 937–38.
[31] *Id.* at 938.
[32] *Id.*

Pinkus acknowledges that "it is hard to see how a number generator could be used to store numbers" but resolves the issue: "Because the phrase 'using a random or sequential number generator' refers to the kinds of telephone numbers to be called' that an ATDS must have the capacity to store or produce, it follows that the phrase is best understood to describe the process by which those numbers are generated in the first place."[33] Under *Pinkus*, the key issue is not how numbers are dialed, but the process for determining which kinds of numbers to dial in the first instance. That analysis is consistent with *ACA Int'l*'s observation that even dialing from lists would entail either dialing randomly or sequentially.[34]

The analysis in *Pinkus* is highly persuasive. It gives meaning to the plain terms of the text, reaches a result consistent with the Commission's initial interpretation, and, as set out below, is far more faithful to Congress's intent and the TCPA's legislative history and overall structure than *Marks*—all without having to torture and rewrite statutory language.

B. *The Court Misreads the TCPA's History and Context.*

The result of the textual analysis is consistent with the TCPA's legislative history and the context in which the term ATDS is used, notwithstanding the Ninth Circuit's contrary conclusion. The *Marks* court recites Congressional concerns regarding the use of automated or computerized calls to set the stage for its conclusion that ATDS are not restricted to calling random or sequentially generated numbers.[35] Properly understood, however, this legislative history demonstrates that Congress's primary concern was not with the use of automated dialing technology *per se*, but with the use of that technology to deliver prerecorded telemarketing messages.

[33] *Id; see also Fleming*, 2108 WL 4562460, at *8–10 (following *Pinkus*).
[34] *ACA Int'l*, 885 F.3d at 702.
[35] *Marks*, 2018 WL 4495553, at *2–3.

This concern is evident in the very legislative history cited in *Marks*, but the court fails to appreciate its import. *See e.g., Marks,* 2018 WL 4495553, at *1 (noting the increase in call volume "due to the advent of machines that 'automatically dial a telephone number *and deliver to the called party an artificial or prerecorded voice message*'") (quoting S. Rep. 107-178 at 2) (emphasis added); *id.* at 5 ("*automated telephone calls that deliver an artificial or prerecorded voice message* are more of a nuisance and a greater invasion of privacy than calls placed by 'live' persons.") (quoting S. Rep. No 178, at 4) (emphasis added); *id.* ("These automated calls cannot interact with the customer except in preprogrammed ways, do not allow the caller to feel the frustration of the called party and deprive customers of the 'ability to slam the telephone down on a live human being.'") (citations omitted) (quoting S. Rep. 102-178, at 4 & n.3).

As the quotes make clear, these concerns relate to the automatic delivery of artificial and prerecorded messages. That concern implicates the definition of ATDS only to the extent that an ATDS is used to deliver such messages to certain categories of numbers reached by happenstance through the calling of randomly or sequentially generated numbers.[36] Once such numbers are reached, the prerecorded messages, especially when sequentially dialed, seize the lines of emergency services, creating public safety hazards, or tie up the lines of businesses or reach cell phones, imposing additional costs. *See, e.g.*, S. Rep. 102-178 at 2 ("some automatic dialers will dial numbers in sequence, thereby tying up all lines of a business and preventing any outgoing calls"); *id* ("unsolicited calls placed to . . . cellular or paging telephone numbers often impose a cost on the called party"); *see also* H. Rep. 102-317 at 10 ("Telemarketers often

[36] As ADT explained in its reply comments, sequential number generation refers to programming the equipment to call all consecutive numbers in a number block, for example, all numbers ranging from XXX-0000 to XXX-9999, without making any effort to ascertain who was being called or the type of telephone line being called. ADT Reply Comments at 3. Calling such numbers can tie up entire businesses or a multitude of cell phone or paging lines because businesses and wireless companies often obtain such big blocks of numbers to provide to their customers. This point is reflected in the legislative history recited herein.

program their systems to dial sequential blocks of telephone numbers, which have included those of emergency and public service organizations . . . [o]nce a phone connection is made, automatic dialing systems can 'seize' a recipient's telephone line and not release it until the prerecorded message is played."); 137 Cong. Rec S. 18785 at 2 (daily ed. Nov. 27, 1991) (noting autodialers can be programmed to "deliver a prerecorded message to thousands of sequential phone numbers. This results in calls to hospitals, emergency care providers, unlisted numbers and paging and cellular equipment. . . . There have been many instances of auto-dial machines hitting hospital switchboards and sequentially delivering a recorded message to all telephone lines.") (statement of Sen. Pressler); 137 Cong. Rec. H. 11310 (daily ed. Nov. 26, 1991) ("automatic dialing machines place calls randomly, meaning they sometimes call unlisted numbers, or numbers of hospitals, police and fire stations.") (statement of Rep. Markey); *The Automated Tel. Consumer Protection Act of 1991*, Hrg. Before the Subcomm. on Commc'ns of the Comm. on Commerce, Science, and Transp., S. 102-960, at 46 (1991) (hereinafter, "*Subcomm. on Commc'ns Hrg.*") ("sequential calling by automatic dialing systems can effectively saturate mobile facilities, thereby blocking provision of service to the public. Because mobile carriers obtain large blocks of consecutive phone numbers for their subscribers, automatic dialer transmitted calls can run through whole groups of paging and cellular numbers at one time. This can result in seizure of a paging carrier's facilities that effectively block service to its customers.") (Statement of Thomas Stroup, Pres., Telocator); *id.* at 33 ("we also strongly agree with the provisions that essentially ban sequential and random dialing because of the great difficulties that they cause in hospital emergency rooms and cellular phones, and things of that nature") (Statement of Richard Barton, Sen. VP, Direct Marketing Association).

As noted by Senator Hollings, the threats to public safety and the adverse effects on interstate commerce caused by calling random or sequentially generated numbers associated with these specific categories of telephone lines eclipsed privacy concerns. 137 Cong. Rec. S. 16205 (Nov. 7, 1991) ("Even more important [than the invasion of privacy], these computerized calls threaten our personal health and safety. . . . Computerized calls tieup [sic] the emergency lines of police, fire, and medical services and prevent real emergency calls from getting through.").

The *Marks* court, however, is oblivious to the distinct automated functions of random/sequential number generation and the delivery of prerecorded messages that can seize lines. Instead, it conflates the two functions noting, for example, that "autodialers" could seize lines.[37] But it is the prerecorded message that seizes lines. The distinct harm caused by automatic telephone dialing systems, as reflected in the legislative history and addressed in the definition of ATDS, is reaching these sensitive categories of numbers through randomly or sequentially generating numbers to be called. The Commission certainly understood the distinction between the two functions: "We emphasize that the term [ATDS] does not include the transmission of an artificial or prerecorded voice."[38]

[37] *Marks*, 2018 WL 4495553, at *2.

[38] *1992 Order* at ¶6. It is also telling that Congress rejected a proposed definition of ATDS that would have included dialing from lists. Specifically, the South Carolina Dep't of Consumer Affairs Administrator, Steve Hamm, in his prepared remarks, suggested that the definition of ATDS in the bill be amended to read: ". . . to store or produce telephone numbers to be called using a random, sequential ***or programmed*** number generator[.]" *The Automated Tel. Consumer Protection Act of 1991*, Hrg. Before the Subcomm. on Commc'ns of the Comm. on Commerce, Science, and Transp., S. 102-960, at 11 (1991) (emphasis added). *See also*, H.R. Rep No. 101-43, at 71 (1989) (suggesting that a suitable definition of an ATDS would be "any device or combination of devices capable of calling multiple telephone numbers sequentially, randomly, or selectively, without the need for a person to manually dial or enter the digits of the telephone number to be called at the time the number is called.") (Statement of Prof. Robert Ellis). The term "or programmed" obviously refers to calling telephone numbers in some order other than random or sequential. "Programmed" implies calling specifically identified lists of numbers.

C. *The Prior Consent Exemption Provides no Basis to Conclude that ATDS Includes Equipment that Calls from Lists.*

The *Mark's* court's failure to appreciate the distinct harms caused by random/sequential dialing, on the one hand, and the delivery of artificial or prerecorded messages, on the other, undermines its contextual analysis. The court relies on the prior consent exemption in section 227(b)(1)(A) and concludes that, to take advantage of the exemption, an autodialer "would have to dial from a list of phone numbers of persons who had consented to such calls."[39] The court overlooks the fact that section 227(b)(1)(A) separately bars the use of ATDS *or* the delivery of artificial or prerecorded messages. The delivery of artificial or prerecorded messages may use autodialing functions, and those autodialers may or may not call randomly or they may call programmed lists. Similarly, artificial or prerecorded messages may be delivered without the use of autodialing technology. As described above, autodialers were, for example, used to make debt collection calls from preprogrammed lists of numbers, but such calls fell outside the definition of an ATDS. And both the Commission and Congress were aware of the use of predictive dialers used to connect customers, including from lists, to live agents.[40] Senator Hollings in fact indicated that predictive dialers that connect live agents were of no concern. 137 Cong. Rec.

[39] *Marks*, 2018 WL 4495553, at *8.

[40] *See, e.g., 1992 Order* at ¶ 8 (Noting that "[m]ost commenters do not object to some form of restriction on live solicitations, but distinguish between live solicitations, *particularly those made by predictive dialers (which deliver calls to live operators)*, and solicitations completed by artificial or prerecorded voice messages.") (emphasis added). Congressional testimony also discussed dialers programmed to call from lists. For example, one witness testified at a hearing on a precursor bill: "There is … a sharp technological distinction between 'random' or 'sequential' number generation and 'programmable' number generation. … Programmable equipment enables a business to transmit a standard … message quickly to a large number of telephone subscribers … with whom the sender has a prior business relationship." Telemarketing Practices: Hearing Before the House Subcommittee on Telecommunications and Finance, 40–41, 101st Cong. (1989) (statement of Richard A. Barton). A law professor commenting on the same bill explained: "The definition of 'automatic telephone dialing system' … is quite limited: it only includes systems which dial numbers sequentially or at random. That definition does not include newer equipment which is capable of dialing numbers gleaned from a database." *Id.* at 71–72 (statement of Robert L. Ellis).

S16204 ("All this legislation requires is that when a person is called at home, there must be a live person at the other end of the line").[41]

Moreover, the prior consent exemption set forth in section 227(b)(1)(A) in no way compels a finding that ATDS must be seen as dialing from lists. In fact, the context of this provision indicates the contrary conclusion because it precludes the use of ATDS only with respect to those categories of numbers that Congress was concerned would be reached through random or sequential dialing – emergency lines, patient rooms, and cellular phones.[42] The court, oddly, refers to these as "other provisions in the statute [that] prohibited calls to specified numbers," but these are the very lines covered by the prior consent exemption in section 227(b)(1)(A) on which the court relies.[43] The court also fails to identify the one other category of numbers for which calls using an ATDS are barred—business lines. 47 U.S.C. § 227(b)(1)(D) (making it unlawful to "use any automatic dialing system in such a way that two or more telephone lines or a multi-line business are engaged simultaneously."). As noted above, Congress was specifically concerned that sequential dialing would tie up business lines,

[41] There is further ample additional legislative history to confirm that Congress's concern lay with automated, prerecorded messages, not with devices that connected consumers with live agents. *See, e.g., Subcomm. on Commc'ns Hrg*.) (Opening Statement of Sen. Hollings) (detailing constituent complaint of being "roused with a telephone [marketing] message, apparently taped" and explaining that "that is an example of the automated calls that this Senator is concerned with, not the live, conversational solicitations. My particular bill [the then-future TCPA] and its thrust is to the automated, mechanically generated type calls."); *id*. at 8 (Prepared Statement of Steven W. Hamm, Administrator, South Carolina Dep't of Consumer Affairs) ("machine-generated telephone calls" are the problem the TCPA was designed to address – "[t]he public at least deserves the right to slam the telephone receiver down and have a real person on the other end of the line hear just how frustrated and angry these calls make people"); *id*. at 13 (Nat'l Ass'n of State Utility Consumer Advocates Resolution Proposing Privacy Protections for Telephone Consumers) ("The use of automatic telephone dialing systems which play recorded messages should be reasonably restricted, except where a called party has given prior consent"); *id*. at 40 (Statement of Michael Jacobson, CoFounder, Center for the Study of Commercialism) ("In my two decades of work with consumer groups, I can think of few issues that bother people more than having a peaceful dinner or evening interrupted by a disembodied telephone delivered recorded sales pitch."); *id*. at 49 (Statement of Gene Kimmelman, Legislative Dir., Consumer Fed. Of Am.) (noting that the Committee was focused "on the problem of dealing with machines talking to people who do not want to listen to machines")

[42] *See* 47 U.S.C. § 227(b)(1)(A)(i)-(iii).

[43] *Marks*, 2018 WL 4495553, at *8.

providing further evidence that the ATDS were restricted because of their capacity to generate sequential numbers.[44]

In sum, the court's contextual argument based on the prior express exemption to conclude that ATDS must include dialing from lists simply does not withstand scrutiny.

D. *The Court's Reliance on the Debt Collection Amendment Fares No Better.*

The Ninth Circuit's only other contextual basis to conclude that ATDS necessarily must include the capacity to dial numbers from lists is Congress's adoption in 2015 of an amendment to the TCPA to exempt calls to collect debts owed to or guaranteed by the Federal Government. The court erroneously draws two inferences from this amendment. It claims that the need to create an exception for calls to sets of known customers (debtors) must mean Congress intended ATDS to dial from lists, else why the need for the exception. This argument shares the same infirmity described above, as debt collection calls are also subject to the dual restrictions of ATDS use or prerecorded messages. Moreover, as *Pinkus* notes, even if there were some validity to the argument that it would be "nonsensical" to exempt debt collection calls to cell phones if ATDS excluded calls to lists, such an argument "does not change the fact that the best reading of [the ATDS definition] requires that ATDS have the capacity to generate numbers randomly or sequentially and then to dial them, even if that capacity is not deployed for practical reasons."[45]

The court further infers that Congress must have blessed the Commission's previous inclusion of predictive dialers within the ambit of ATDS because Congress is deemed to be

[44] The court overlooks other nuances of the statute. It often cites legislative history indicating concern over the impact of "computerized calls" to residential lines. But the statute does not bar the use of ATDS for such calls. With respect to residential lines, the TCPA only bars the use of artificial or prerecorded messages. 47 U.S.C. § 227(b)(1)(B).

[45] *Pinkus*, 319 F. Supp. 3d at 939.

aware of that ruling and made no effort to change it. *Marks* reads too much into Congressional inaction. Congress was presented with a discrete issue—the need to recover federal debt by enabling calls to federal debtors without fear of potentially crushing litigation. It forthrightly addressed that problem by creating a limited exemption from the requirement of prior consent. That Congress did not feel the need to address the thorny issue of the definition of an ATDS is perfectly understandable.

Supreme Court and Ninth Circuit precedent have made clear the dangers of assuming acquiescence through Congressional inaction or silence. *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994) ("Furthermore, our observations on the acquiescence doctrine indicate its limitations as an expression of congressional intent. It does not follow . . . that Congress' failure to overturn a statutory precedent is reason for this Court to adhere to it. It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the [courts'] statutory interpretation") (citations omitted); *see also Helvering v. Hallock*, 309 U.S. 106, 121 (1940) ("[W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle."); *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 886-87 (9th Cir. 2016) ("[C]ongressional inaction in the face of a judicial statutory interpretation . . . carries almost no weight.").[46]

[46] *Lorillard v. Pons*—the case cited in the Ninth Circuit's *Marks* opinion as standing for the proposition that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"—is distinguishable from the 2015 Bipartisan Budget Act ("BBA") amendments to the TCPA. In *Lorillard*, the Supreme Court found that congress acquiesced to certain interpretations of the Fair Labor Standards Act's (FLSA) enforcement provisions when it incorporated those provisions of the FLSA into the Age Discrimination Employment Act. 434 U.S. 575, 580–581 (1978). In the 2015 BBA amendments, however, Congress has not "re-enacted" any provisions of the TCPA with respect to the FCC's or courts' definitions of ATDS, but merely carved out an exemption to the TCPA without needing to address underlying statutory definitions.

Moreover, given the then-existing conflicting interpretations of the Commission regarding the necessary functionalities of an ATDS, it cannot be inferred that Congress necessarily understood that equipment could qualify as an ATDS even if it did not itself have the capacity to generate random or sequential number blocks to be called. *See ACA Int'l*, 885 F.3d at 702; *Fleming* , 2018 WL 4562460, at *8 (noting that "the FCC Orders *are* confusing – at times seeming to require that a prohibited device possess the capacity to generate random or sequential numbers, but elsewhere prohibiting devices that lack that capacity.") (emphasis in original). Congressional silence could just as readily be interpreted to indicate acquiescence in the narrower interpretation. *Central Bank*, 511 U.S. at 187 ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction.").

IV. The Commission Should Clarify the Extent of Human Intervention Required to Disqualify Equipment as Automatic Telephone Dialing Systems.

The Commission should confirm that human intervention disqualifies equipment as ATDS, and it should clarify the degree of human intervention required. Although *Marks* recognizes that some degree of human intervention would disqualify equipment as ATDS, the court appears to take a very cramped view of the degree of human intervention required. It suggests that human intervention must occur at the dialing stage: "Crunch does not dispute that the Textmunication system dials numbers automatically, and therefore has the automatic dialing

function necessary to qualify as an ATDS, even though humans, rather than machines, are needed to add phone numbers to the Textmunication platform."[47]

This language suggests that anything short of humans manually dialing a number would be insufficient human intervention. If that is the court's intent, it would effectively nullify the human intervention requirement, and it would conflict with numerous cases holding that human intervention in the form of clicking on a number automatically to an agent or other pre-dialing activities are sufficient human intervention.[48] The Commission should take this opportunity to both confirm that human intervention removes equipment from the definition of ATDS and clarify the degree of human intervention required. With respect to the latter question, the Commission should confirm, as a number of courts have, that minimal human intervention preceding the dialing function, such as manually clicking on a telephone number to initiate the dialing sequence, renders calling and texting platforms outside the definition of an ATDS.[49]

[47] *Marks*, 2018 WL 4495553, at *9. The court appears to give short shrift the extent of human involvement with the platform, which is substantial. As described in the opinion, Textmunication is "a web-based marketing platform designed to send promotional texts to a list of stored telephone numbers." *Id.* at *6. To send a text using the platform, "a Crunch employee logs into the Textmunication system, selects the recipient phone numbers, generates the content of the message, and selects the date and time for the message to be sent. The Textmunication system will then automatically send the text messages to the selected phone numbers at the appointed time." *Id.* It appears to be court's view that any human involvement prior to the time of actually dialing the number does not count, contrary to the findings of other courts. *See, e.g.*, *Gary v. Trueblue, Inc.*, No. 17-cv-10544, 2018 U.S. Dist. LEXIS 175021, at *2-3, *11-18 (E.D. Mich. Oct. 11, 2018); *Herrick v. GoDaddy.com LLC*, 312 F. Supp. 3d 792, 802-03 (D. Ariz. 2018) (citing cases); *Jenkins v. mGage*, No. 1:14-cv-2791, 2016 WL 4263937, at *1-2, *5-7 (N.D. Ga. Aug. 12, 2016); *Luna v. Shac LLC*, 122 F. Supp. 3d 936, 937 (N.D. Cal. 2015)

[48] *See, e.g.*, *Fleming*, 2018 WL 4562460; *Arora v. Transworld Sys. Inc.*, No. 15-cv-4941, 2017 WL 3620742 (N.D. Ill. Aug. 23, 2017); *Schlusselberg v. Receivables Performance Mgmt., LLC*, No. 15-7572, 2017 WL 2812884 (D. N.J. June 29, 2017); *Smith v. Stellar Recovery, Inc.*, No. 15-cv-11717, 2017 WL 1336075 (E.D. Mich. Feb. 7, 2017); *Pozo v. Stellar Recovery Collection Agency, Inc.*, No. 8:15-cv-929, 2016 WL 7851415 (M.D. Fla. Sept. 2, 2016); *Messina v. Green Tree Servicing, LLC*, 201 F. Supp. 3d 992 (N.D. Ill. 2016); *Strauss v. CBE Grp., Inc.*, 173 F. Supp. 3d 1302 (S.D. Fla. Mar. 28, 2016); *Estrella v. Ltd Financial Servs., LP*, No. 8:14-cv-2624, 2015 WL 6742062 (M.D. Fla. Nov. 2, 2015); *Gaza v. LTD Financial Servs., L.P.*, No. 8:14-cv-1012, 2015 WL 5009741 (M.D. Fla. Aug. 24, 2015).

[49] *See* ADT Comments at 13, n.21 (citing cases finding than manually clicking on the number to be called constitutes sufficient human intervention and rejecting claims that a human must manually dial the number).

V. To Fully Restore the Balance Intended by Congress, the Commission Should Exempt Non-Telemarketing Calls to Cell Phones from the TCPA's Prior Consent Requirement.

In its previous comments, ADT urged the Commission to use its delegated authority to update the TCPA to reflect today's technologies and modes of communication.[50] If nothing else, the *Marks* decision and other courts' tortured efforts to identify what qualifies as an ATDS given today's technologies screams out for a more holistic approach. Even if the Commission restores the ATDS definition to its plain meaning and, consistent with Congressional intent, requires the ATDS to have the present capacity to generate random or sequential numbers, inventive plaintiffs likely will continue to clog the courts with litigation targeting legitimate business contacts.

The current explosion of TCPA litigation results from the confluence of technology changes, primarily the replacement of residential lines with cell phones, implicating ATDS equipment, and the antiquated structure of the TCPA coupled with the Commission's expansive interpretations that expose companies to liability for making legitimate non-telemarketing, informational calls to cell phones (but not residential lines).[51]

This was never Congress's intent. The legislative history is replete with admonitions that normal, expected communications between businesses and their customers were not the object of the TCPA's restrictions and would be protected. The House version of the bill, for example, only restricted solicitations made without consent, and even with respect to telemarketing, the House bill would have exempted telemarketing calls to consumers with whom the business had a

[50] ADT Comments at 25-29.
[51] ADT's initial and reply comments provide details regarding the transition from landlines to cell phones. ADT Comments at 25-27.

prior relationship.[52] Congress found that calls to consumers with an established business relationship did not implicate the same privacy concerns as the much-decried marketing cold calls.[53] The business relationship exemptions continues to apply to telemarketing calls to numbers on the National Do Not Call Registry. Although the final version of the TCPA is not expressly limited to telemarketing calls, in order to avoid First Amendment content-based challenges,[54] the legislative history and Congressional findings nevertheless confirm that auto-dialed prerecorded *telemarketing* calls were the primary concern. This conclusion is further reflected by the Commission's determination to exclude informational calls, including debt collection calls, to residential lines.[55]

The Commission has the authority to update the TCPA to reflect the way consumers and businesses communicate today, which is via cell phone calls and texts. The Commission could equalize the treatment of cell phones and landline residential phones by extending to cell phones the current exception for informational calls applicable to landlines. The Commission could do so, for example, by adopting an established business relationship exception for informational calls to cell phones. Additionally, as explained in ADT's comments, the TCPA authorizes the Commission to exempt calls that are made to cell phones without charge.[56] This authority, of course, reflects the fact that Congress restricted ATDS calls to cell phones because of the

[52] H. Rep. 102-317 at 2 (barring use of ATDS "to make any telephone solicitation", and excluding from the definition of "telephone solicitation" any call where the caller has an established business relationship).
[53] *Id.* at 14
[54] S. Rep. 102-178 at 4 ("Some people have raised questions about whether S. 1462 is consistent with the First Amendment protection of freedom of speech. . . . The reported bill does not discriminate based on the content of the message."); 137 Cong. Rec. S. 16206 (noting need for consistency with First Amendment and avoiding "drawing any distinctions based on the content of the message being delivered") (statement of Senator Hollings).
[55] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 7 FCC Rcd. 8752, 8771-73 (1992)
[56] ADT Comments at 27 (citing § 227(b)(2)(C)). This provision was not in the original legislation. It was added [ ].

additional costs such calls imposed.[57] At the time, wireless providers charged as much as 50 cents a minute for incoming cell phone calls.[58] Today, however, virtually all cell phone calls and texts are made without charge as they are bundled in unlimited plans.[59] The Commission should utilize its expressly delegated authority to exempt informational calls to cell phones where the call is free of charge, either because the call (or text) is part of an unlimited calling plan or otherwise not subject to an incremental fee or because the caller has entered into an appropriate arrangement with wireless companies to ensure the call is free. The Commission may, of course, temper such an exemption with reasonable limitations "as necessary in the interests of the privacy rights this section is intended to protect."[60]

Conclusion

For the reasons stated herein, the Commission should reject the conclusion reached by the Ninth Circuit that ATDS includes equipment that dials numbers from lists. The Commission should instead take this opportunity to confirm definitively that ATDS equipment must have the present capacity to store and produce telephone numbers using a random or sequential generator and to dial the numbers so generated without human intervention. As importantly, the Commission should restore the balance contemplated by Congress to protect consumers from unwanted and unsolicited telemarketing "robocalls," while exempting informational calls to cell phones just as such calls are exempt when made to residential lines.

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[57] *See, e.g.*, S. Rep. 102-178, at 2 (unsolicited calls to cellular telephone numbers "often impose a cost on the called party . . . cellular users must pay for each incoming call"); *1992 Order* at 8775, para. 45 ("Based on the plain language of § 227(b)(1)(iii), we conclude that the TCPA did not intend to prohibit autodialer or prerecorded message calls to cellular customers for which the called party in not charged" and exempting calls made to a cell phone user by its provider that do involve a charge.).

[58] ADT Comments at 25.

[59] ADT Comments at 26; *see also* Comments of Credit Union National Association, CG Docket Nos. 02-278, 18-152, at 11 (filed June 13, 2018).

[60] ADT explained in its comments that the Commission may protect such privacy interests by "placing reasonable limits on the frequency of calls" and providing for reasonable opt out mechanisms. ADT Comments at 27-29.

Respectfully submitted,

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October 17, 2018